Thank you and Ecology for the opportunity to comment on the draft Industrial Stormwater General Permit ("ISGP"). These comments include first a general discussion of overarching themes and then specific section by section comments.

At the outset, I commend you and Ecology for the substantial improvements over the previous 1995/2000 permit. The ISGP represents a major step forward in Ecology's regulation of industrial stormwater. I am particularly gratified to see that the ISGP includes substantial monitoring and reporting requirements that were promised by the first permit, ten years ago. I do think it is a shame, however, that it took an appeal of the entirely inadequate 1995 permit, reissued without substantial change in 2000, by five environmental organizations and myself to bring about this improvement. As you know, this appeal consumed a significant portion of Ecology's stormwater staff resources, as well as those of the environmental appellants and this law firm. State and federal law include numerous stringent requirements for NPDES permits regulating industrial stormwater and the 1995/2000 permit failed to meet many of them. While this draft ISGP does address several of the 1995/2000 permit deficiencies in this respect, it too falls short of meeting applicable, and clear, legal requirements, as well as a number of measures that a diligent regulator would include to ensure that industrial stormwater is properly controlled and environmental impacts eliminated or minimized to the extent possible. These requirements and measures are discussed in these comments. I am determined to have Ecology issue a permit that meets all legal requirements. It would be unfortunate, to say the least, to have to repeat the inefficient and often frustrating experience of a permit appeal when the legal requirements are clear and I urge Ecology to make appropriate changes to the ISGP to avoid such a repeat. The choice is yours.

Overarching Themes

The ISGP, like NPDES permits generally, must require compliance with water quality standards and implementation of AKART. A permit cannot be considered to meet these requirements if conditions concerning water quality standards compliance and implementation of AKART are not enforceable as a practical matter. For the most part, the ISGP fails this test. While the ISGP does include commendable, strong language concerning compliance with standards, it also includes substantial loopholes, most notably including provisions for easy granting of mixing zones and the compliance schedule for discharges of pollutants of concern to 303(d)-listed waters, that would effectively make it impossible to enforce the standards compliance language. AKART implementation requirements also need revision. While the ISGP would require implementation of SWPPP BMPs, it includes no requirement that SWPPPs or inspection reports documenting compliance be submitted or otherwise available to the public. In addition, many permittees would not be required to update their SWPPPs to reflect the enhanced BMPs included in the updated Stormwater Management Manual for Western Washington. The deficiencies in the ISGP's conditions concerning AKART are particularly troubling as rates of compliance with BMP implementation have been quite low, as Ecology notes in the draft Fact Sheet:

> As of December 26, 2001, Ecology's Northwest Regional Office had 628 Permittees with coverage under the industrial stormwater general permit, the Southewst Regional Office had 514 Permittees, the Central Regional Office had 62 Permittees, and the Eastern Regional Office had 59 Permittees. Site visits are a very important part of assuring compliance with permit requirements. Ecology's regional offices are able to inspect

> between 15% to 30% of the industrial facilities each year. Facilities that are failing to comply often require multiple site visits. Facility inspections have revealed that many facilities with permit coverage are not in compliance with permit provisions. The [SWPPP] is a critical permit requirement, identifying how stormwater at a facility will be managed to prevent stormwater pollution. However, it is estimated that as recently as August 2001, only about half of the facilities with permit coverage could locate their SWPPP during an Ecology inspection. Even fewer had a SWPPP that was kept up-to-date and fully implemented. Best management practices (BMPs) are required by the permit to prevent stormwater pollution. Based on site inspections, about 60% to 70% of the facilities could identify one or more BMPs (sic) that were maintained to manage stormwater, but no more than 25% would be considered in full compliance with permit BMP requirements. It is estimated that at least 10% to 15% of the permitted facilities have a stormwater discharge that is likely to be causing a measurable environmental problem.

Draft Fact Sheet at 15-16 (1st)[1] (underline added).

The problems with the standards compliance and AKART requirements in the draft ISGP seem to result in substantial part from purported resource constraints. For example, Ecology is not going to collect much information from permittees seeking mixing zones to make mixing zone determinations as required by state regulation because Ecology does not have the resources to make all of the anticipated determinations; Ecology is not going to oversee facility improvements in the context of the compliance schedule for noncompliant discharges to 303(d) listed waters because it does not have enough staff; and Ecology is not going to require submission of updated SWPPPs or self-inspection (visual monitoring) reports because it cannot handle the paperwork. It is unacceptable to sacrifice environmental protection and attainment of regulatory requirements on the basis of resource constraints when alternatives exist. Here, the alternative to creating an unenforceable and loophole-ridden regulatory scheme is to shift the burden to permittees. Permittees are not legally entitled to mixing zones or compliance schedules or to the other breaks afforded them in the ISGP as a result of Ecology's purported resource constraints. In addition, I must point out that if the legislature refuses to adequately fund Ecology's NPDES program or stormwater management, Ecology, or others, can take steps to return full or partial regulatory authority to EPA.

To end this portion of these comments on a positive note, in addition to the long-overdue inclusion of requirements for discharge sampling, the ISGP is generally a well-written general permit. Especially in comparison to the mess that is the 1995/2000 permit, the requirements of the ISGP are understandable and fitted together.

Condition by condition comments

Condition S1

[1] The pagination of the draft Fact Sheet, as downloaded from Ecology's website, is fouled. Throughout these comments, "(1st)" refers to the first pages 15-16 in the draft Fact Sheet, "(2nd)" refers to the second time page numbers appear in the document, etc.

1) Footnote 1 to S1.C.6. refers to "restrictions for the protection of endangered species" as a type of "control plan" that results in possible exclusion from coverage for facilities to waters subject to such control plan. It is unclear what sort of "restrictions for the protection of endangered species" are contemplated here. Please clarify this and provide an example.

2) Footnote 1 to S1.C.6. also refers to possible exclusion from coverage for dischargers to waters covered by TMDLs. How does Ecology contemplate treating industrial stormwater discharges of pollutants of concern to waters covered by a TMDL when the TMDL does not address stormwater discharges?

3) S1.C.7. states that dischargers of pollutants of concern to 303(d) listed waters are excluded from coverage "unless the Permittee can meet the requirements of special condition S3.D." S3.D. requires point of discharge compliance with water quality criteria for pollutants of concern, except that existing facilities are allowed a "compliance schedule" if they cannot meet this limitation. Given this "compliance schedule" for existing discharge and the 40 C.F.R. § 122.4(i) prohibition on new discharges that will contribute to a violation of water quality standards, there appear to be no circumstances under which coverage would be prohibited by S1.C.7. Please explain what this condition contributes to the permit or under what circumstances it would operate to preclude coverage.

<u>Condition S2</u>

4) S2.B.3.b. says that facilities that had coverage but lost it due to their own action or inaction are to be considered new facilities and must meet the requirements of S2.B.3.c. This is good, as these facilities should be required to have SWPPPs fully implemented without any compliance schedule. Please clarify that this provision includes facilities that are "existing" but which only started operations after November 18, 1995.

5) S2.B.4.c. requires permittees to submit updated SWPPPs with an application for modified coverage. This is a good provision and should allow Ecology and the public to ensure SWPPP adequacy for these facilities. However, the ISGP should require all permittees to submit current SWPPPs to Ecology upon Ecology's request or request from the public, with appropriate provisions to ensure that updated SWPPPs are not requested at unduly short time intervals. It is essential that the public and Ecology be allowed access to SWPPPs to monitor and ensure compliance, especially since the only documentation of self inspections (visual monitoring) is included in SWPPPs.

6) S2.B.5. implies that a standard, as opposed to an expanded, mixing zone requested with a "modification of coverage" application becomes effective automatically upon expiration of the public notice period. (S2.B.5.c. requires Ecology approval only for expanded mixing zones.) Please clarify whether this interpretation is correct. If it is, this condition should be changed to require Ecology approval of a standard mixing zone before it can come into effect. Please explain how this condition comports with WAC 173-201A-100, which requires Ecology to make various determinations before authorizing a mixing zone.

7) S2.C. has four subconditions setting forth compliance schedule requirements conditioned by the language "unless otherwise authorized by Ecology in writing." While

it is good that the "otherwise authorization" must be in writing, this language is problematical. An NPDES permit is to establish permit conditions, not to make Ecology's exercise of its enforcement discretion an automatic modification of permit conditions. Inclusion of this language in these subconditions effectively means that Ecology can modify the substantive requirements of the permit by writing a letter to a permittee. A major permit modification, such as a change to a compliance schedule, requires public notice and opportunity to appeal. 40 C.F.R. §§ 122.62(a)(4) and 124.5(c). Please explain how the "otherwise authorized" language does not subvert these federal regulatory requirements. Ecology can always exercise its enforcement discretion by issuing an order or otherwise. It should not set up permit conditions that effectively modify the permit when enforcement discretion is exercised. It is also inappropriate, and unfair to the commenting public, to have these compliance schedules really be whatever Ecology says they are later – no one can comment meaningfully on these provisions or determine the adequacy of the compliance schedules in this circumstance. This language should be removed.

8) While the contents of the public notice required by S2.D. are adequate, the means of notice – publication in a newspaper of general circulation within the county in which the discharge is proposed – is not adequate. Federal regulations require that notice of permitting activity be provided to a list of interested persons. 40 C.F.R. § 124.10(c)(1)(ix). Please explain how the ISGP meets this regulatory requirement. This condition should be changed to require the permittee to mail notice to those on a list of interested persons. As written, the condition does not include methods of public notice reasonably calculated to give actual notice of the action in question to the persons potentially affected by it. 40 C.F.R. § 124.10(c)(4).

9) S2.E.1. also implies that coverage under the permit with a standard mixing zone does not require notification from or a determination by Ecology. See comment no. 6 above. This condition should be changed to clarify that no mixing zone is effective until Ecology makes a written determination.

10) The S2.F. requirement that permittees comply with local government regulations and meet the more stringent of permit or local jurisdictional requirements is excellent. This is an important step in integrating multi-jurisdictional stormwater regulation.

Condition S3

11) In S3.D.1., what does it mean that all new discharges "must be in compliance with any applicable TMDL determination" where the TMDL does not explicitly address stormwater and the new discharge is of a pollutant of concern? How does this meet the prohibition on new discharges that would contribute to a violation of water quality standards in 40 C.F.R. § 122.4(i)?

12) The language that requires compliance at the point of discharge in S3.D.1. and 2. is excellent. However, the "compliance schedule" in S3.D.2. is illegal and must be removed or modified. Under S3.D.2., the requirement to meet water quality standards at the point of discharge is rendered unenforceable and effectively meaningless because the "compliance schedule" "immediately becomes applicable" when a permittee "fails to comply" with this effluent limitation. The Clean Water Act requires industrial stormwater discharges to comply "strictly" with water quality standards regardless of technological limitations. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-65 (9th Cir. 1999).

The "compliance schedule" is really a noncompliance schedule – it has no endpoint when actual compliance with standards is required, it requires no oversight by or reporting to Ecology, and it could be interpreted to restart every time that a permittee detects a violation of water quality criteria for a pollutant of concern at the point of discharge.

The Clean Water Act explicitly provides that permits for industrial stormwater discharges "shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit." 33 U.S.C. § 1342(p)(4)(A); *see also* 40 C.F.R. § 122.42(d). The "compliance" referred to here is the strict compliance with water quality standards required by section 402(p)(3)(A). 33 U.S.C. § 1342(p)(3)(A). 33 U.S.C. § 1342(p)(3)(A) is also discussing *initial* permits – thus, the three-year limit should be counted from the date that the discharger was first covered by an Ecology industrial stormwater permit, which could be as early as 1992. *See also*, 40 C.F.R. § 122.42(d).

A legitimate compliance schedule leads to compliance with the statute and regulations. 40 C.F.R. § 122.47(a) and (a)(1); WAC 173-201A-160(4)(a). The S3.D.2. "compliance schedule" never requires actual compliance with water quality standards.

At a minimum, a compliance schedule in an industrial stormwater permit must require notification to the permitting authority of compliance or noncompliance with each interim date not later than 14 days after such date. 40 C.F.R. § 122.47(a)(4); *see also*, WAC 173-226-180(4). The ISGP "compliance schedule" includes no such notification.

Washington's regulation on water quality standards, in a section directly applicable to industrial stormwater, provides that "[i]f a discharger is applying all best management practices appropriate or required by the department and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, *selected or approved by the department*, to achieve compliance with water quality criteria." WAC 173-201A-160(3)(b) (emphasis added). The S3.D.2. "compliance schedule" contemplates no Ecology involvement.

Please explain how the S3.D.2. "compliance schedule" satisfies the statutory and regulatory requirements identified in this comment. The "compliance schedule" should be either removed from the ISGP altogether or S3.D.2. should be changed to indicate that implementation of the tasks required by the compliance schedule does not relieve the permittee of the underlying violation of the water quality standards at the point of discharge.

13) The S3.E. provision regarding mixing zones would also substantially subvert the Clean Water Act mandate for the ISGP to require compliance with water quality standards. It is foreseeable that the vast majority of permittees would seek and obtain mixing zones under the ISGP, no matter whether regulatory restrictions on mixing zones are met. As a result, it would be extremely difficult to determine whether any permittee is violating the permit prohibition on discharges that cause or contribute to violations of water quality standards. Enforcement of the standards compliance language would be impossible in most cases.

Ecology's mixing zone regulation, WAC 173-201A-100, requires Ecology to make determinations before a mixing zone can be granted. These include that the "supporting

information clearly indicates" that the mixing zone "would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health." WAC 173-201A-100(4). Ecology must "consider critical discharge conditions" in making its mixing zone determinations. WAC 173-201A-100(3). Dischargers must be "required to apply AKART" before a mixing zone can be authorized. WAC 173-201A-100(2). To depart from maximum size and overlap restrictions on mixing zones, as the standard mixing zones in the ISGP do, Ecology must make further determinations based on a clear demonstration by the discharger. WAC 173-201A-100(10)(b). It is plain, on the basis of the inadequate information required by the "Mixing Zone Request" form and the provision for approval by default of standard mixing zone requests (see comments nos. 6 and 9 above), that Ecology does not contemplate making these determinations before authorizing standard mixing zones.

The "Mixing Zone Request" form requires only identification of the receiving waters and a certification that the permittee has implemented AKART and is "managing stormwater discharges to protect the beneficial uses of the receiving water." Draft Fact Sheet, Appendix E (p. 39 (2nd)). This form should be modified to require submission of all information necessary to allow Ecology to make the determinations required by the mixing zone regulation.

Please explain how Ecology's administration of requests for standard mixing zones will satisfy the requirements of WAC 173-201A-100. Permittees do not have any "right" to mixing zones. If Ecology cannot muster the resources to make proper mixing zone determinations under the ISGP, then no mixing zones should be allowed.

14) S3.E. implies that there would be no public notice nor opportunity for comment or appeal for existing facilities because they would not be required to submit an application for coverage to be "eligible" for the standard mixing zone. Since these permittees do not have to submit applications for coverage or, under the requirements of this condition, an application for modification of coverage, public notice and participation on this crucial aspect of a permittee's coverage would be avoided. This is illegal and unacceptable. Federal regulations require public notice for permit issuance and modification actions that include the draft permit conditions, of which any mixing zone authorization is an essential part. 40 C.F.R. § 124.10(d)(iv). The ISGP should be changed to require compliance with public notice procedures for any application for a mixing zone.

15) The S3.E.1. statement that "[a] mixing zone is only applicable when" items a. through e. are met is unclear. Please clarify the meaning of this statement. Does it mean that there is no longer a mixing zone after, for example, a permittee fails to apply "[a]ll appropriate best management practices established for stormwater pollutant control" at any time after being awarded a mixing zone? In this example, would the permittee need to reapply for a mixing zone to have it reinstated after the permittee is found to have failed to apply all appropriate BMPs? In what contexts does Ecology anticipate making the determination mentioned in S3.E.1.d.?

<u>Condition S4.</u>

16) 40 C.F.R. § 122.44(i)(4) specifically addresses monitoring and recordkeeping requirements for industrial stormwater permits. Among these are requirements that the permittee make specific findings from inspections concerning the adequacy and

implementation of the SWPPP, that the records of inspections be maintained for three years and *certify* that the permittee is in compliance with the SWPPP and identify any incidents of noncompliance, and that the inspection reports and certification satisfy the 40 C.F.R. § 122.22 signatory requirements. 40 C.F.R. § 122.44(i)((4)(i) – (iii). Please explain how the ISGP satisfies these requirements if you contend that it does. Otherwise, the ISGP should be changed to include satisfactory requirements for inspections (visual monitoring) that set forth the details of the records to be kept.

17) The ISGP should require that inspection reports be submitted to Ecology on a regular basis. Given the low rates of compliance with SWPPP and BMP requirements documented in the draft Fact Sheet (p. 15-16 (1st)), submission of these reports of inspections would be an excellent way to improve compliance rates and detect noncompliance.

18) S4.2. appears to be missing the word "before" ("which must be sampled [before] stormwater from the coal pile commingles …").

19) S4.A. requires sampling to begin only in the first quarter of 2003. Sampling should begin in the fourth quarter of 2002.

20) S4.A. allows sample analysis by other than specified methods. It should therefore clarify that sampling and analysis procedures must be representative of the quality and nature of the discharge.

21) The ISGP and Fact Sheet should include unequivocal statements that attainment of benchmark values does not necessarily equal compliance with water quality standards.

22) Section 308(a) of the Clean Water Act mandates that NPDES permits include monitoring requirements sufficient to determine whether effluent limitations are being violated. 33 U.S.C. § 1318(a). How would the monitoring required by the ISGP allow a determination as to whether permitted discharges are causing or contributing to violations of water quality standards, especially when mixing zones are authorized?

23) S4.B.2. should specify that air transportation group monitoring should start in December 2002.

24) S4.D. requires monitoring "as required by the TMDL" where there is one. What if the TMDL does not address stormwater? Perhaps the language should be changed to: "Where the TMDL determination sets load allocations for new discharges or limits pollutant concentrations in the discharge, the Permittee must conduct monitoring for the named pollutant(s) and such monitoring shall be consistent with TMDL requirements, if any."

<u>Condition S5.</u>

25) Electronic submission of monitoring information must meet federal regulatory signatory requirements.

26) S5.D. states that additional results of monitoring beyond that required by the permit must be included in DMRs only if done "using test procedures specified by

Condition S4." S4.A. allows use of test methods "equivalent or superior" to those identified. Please clarify that results of additional monitoring derived from "equivalent or superior" test methods must be included in DMRs.

27) S5.E.3. includes the objectionable "unless otherwise authorized by Ecology" language. See comment no. 7. At a minimum, this subcondition should specify that such "other authorization" must be in writing.

Condition S6.

28) Electronic submission of the "no exposure" form must meet federal regulatory signatory requirements.

29) To address runoff that contacts contaminated ground under covered areas, but not necessarily materials or machines, S6.C.1. should be changed to state: "All areas where industrial materials and/or activities occur must be protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt and/or runoff."

30) S6.D. provides for default granting of "no exposure" status sixty days after submission of a form. No "no exposure" status should be allowed until Ecology makes a written determination that such status is warranted. EPA regulations contemplate that a permitting agency must make a determination before "no exposure" status is allowed.

Condition S7.

31) The statement in S7.A. that "[c]ompliance with surface water quality standards shall be determined after consideration of available dilution" needs further explanation. How, exactly, is this compliance to be determined? What does "consideration of available dilution" entail? Unless Ecology can answer these questions, it cannot be said that the ISGP meaningfully requires compliance with water quality standards because such compliance could not be determined and would be unenforceable as a practical matter.

32) In addition to numerical water quality criteria for various pollutant parameters, Washington's water quality standards include descriptions of characteristic uses (e.g., water supply; fish migration, rearing, spawning, and harvesting; wildlife habitat, recreation) and protection of aesthetic values ("[a]esthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, tough, or taste"). WAC 173-201A-030. Please explain whether "available dilution" would be considered in determining compliance with water quality standards besides numerical water quality criteria where a mixing zone is authorized under S7.A. If so, please explain how "available dilution" would be considered in this respect.

33) S7.C. provides that when a stormwater treatment system does not "fully function during a storm that exceeds the water quality design storm" there is no permit violation. This is flatly illegal. The Clean Water Act imposes on an NPDES permitting agency "a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability." *Defenders of Wildlife*, 191 F.3d at 1163. Ecology cannot excuse discharges that cause or contribute to violations of water quality standards when a design storm is exceeded.

This is a particularly egregious condition given that the design storm is a mere 6 month, 24 hour storm event. Fact Sheet at 35 (1st). This condition should be removed from the ISGP, or at least moved to the "operation and maintenance" section, S8., where it can be specified to refer only to excusing compliance with technology-based limitations.

Condition S9.

34) S9.A.4. includes the objectionable "unless otherwise authorized by Ecology" language. See comment no. 7 above.

35) S9.A.5.b. appears to allow "[e]xisting permitted facilities that comply with standards" to forgo modifying their SWPPPs to reflect changes and updates to BMPs from the ten year old Stormwater Management Manual for Puget Sound to the new Stormwater Management Manual for Western Washington. Ecology must require implementation of AKART through the ISGP. RCW 90.48.010, .520, 90.52.040, and 90.54.020(3)(b); *see also*, WAC 173-226-070(1). The upgraded Western Washington Manual currently represents AKART across the state and the expected Eastern Washington Manual will represent AKART for Eastern Washington once it is developed. Please explain how the ISGP requires implementation of AKART for all permittees when it does not require updating of SWPPPs to incorporate new or enhanced BMPs identified in the new manuals. The ISGP should be changed to mandate that all permittees implement AKART by modifying their SWPPPs to meet the standards set by the new manuals.

36) S9.A.6. should require applicable portions of other plans incorporated by reference into SWPPPs to be physically appended to SWPPPs when SWPPPs are submitted to Ecology.

37) The "check list for visual monitoring" in S9.B.2.b. needs definition. See comment no. 16.

38) S9.B.3.a.vi. directs that "[t]here will be documentation of visual monitoring reporting and recordkeeping procedures and schedules as required in Special Condition S5. of this permit." This sentence is unclear. In addition, S5. does not say anything about visual monitoring. See comments nos. 16 and 17.

Thank you again for your work on the ISGP and for this opportunity to comment. I look forward to your responses and, hopefully, improvements to the ISGP before finalization.